

## Update: Sexual Assault Benchbook

### CHAPTER 2

#### The Criminal Sexual Conduct Act

##### 2.4 “Assault” Offenses

###### A. Assault With Intent to Commit Criminal Sexual Conduct Involving Penetration

###### 2. Elements of Offense

On page 44, insert the following text before the “Note” near the middle of the page:

In *People v Nickens*, \_\_\_ Mich \_\_\_, \_\_\_ (2004), the Michigan Supreme Court affirmed that the elements of assault with intent to commit criminal sexual conduct involving penetration are as follows:

- ◆ The defendant committed an assault; and,
- ◆ The defendant had the intent to commit criminal sexual conduct involving penetration.

## CHAPTER 2

### The Criminal Sexual Conduct Act

#### 2.6 Lesser-Included Offenses Under CSC Act

##### B. Applicable Statute and Three-Part Test

Insert the following case summary on page 110 immediately before the beginning of subsection C:

*\*People v  
Cornell*, 466  
Mich 335  
(2002).

In *People v Nickens*, \_\_\_ Mich \_\_\_ (2004), the Supreme Court applied the three-part test outlined in *Cornell*\* and MCL 768.32. In *Nickens*, the defendant was charged with first-degree criminal sexual conduct involving personal injury and the use of force or coercion to accomplish sexual penetration, MCL 750.520b(1)(f). At trial, the court instructed the jury on this charge and on the charge of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). The defendant objected to the latter instruction. The defendant was found guilty of violating MCL 750.520g(1). *Nickens, supra* at \_\_\_.

The Supreme Court found that the elements of assault with intent to commit criminal sexual conduct involving penetration are (1) an assault and (2) an intent to commit criminal sexual conduct involving sexual penetration. Nonconsensual sexual penetration with another is an “attempted-battery” assault and a battery; therefore, the first element above is always satisfied when the actor violates MCL 750.520b(1)(f). In addition, the intent to commit criminal sexual conduct involving sexual penetration is always present when the defendant commits first-degree criminal sexual conduct under MCL 750.520b(1)(f). Because the elements of assault with intent to commit criminal sexual conduct involving penetration under MCL 750.520g(1) are included in first-degree criminal sexual conduct under MCL 750.520b(1)(f), assault with intent to commit criminal sexual conduct involving penetration is a necessarily lesser-included offense of first-degree criminal sexual conduct. *Nickens, supra* at \_\_\_. The Court found that a rational view of the evidence in this case supported the instruction of assault with intent to commit a criminal sexual conduct involving penetration. *Nickens, supra* at \_\_\_.

## CHAPTER 7

### General Evidence

#### 7.6 Former Testimony of Unavailable Witness

Insert the following text on page 364 after the April 2004 update:

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, \_\_\_ Mich App \_\_\_ (2004). In *McPherson*, the defendant was convicted of murder. A co-defendant made a statement to police that identified the defendant as the shooter. Prior to trial, the co-defendant died but his statement was admitted at trial. In applying the U.S. Supreme Court's holding in *Crawford v Washington*, \_\_\_ U.S. \_\_\_ (2004),\* the Court of Appeals found the co-defendant's statement to police was "testimonial." However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its substance, but to impeach the defendant. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford v Washington, supra* or the Confrontation Clause.

\*See the April 2004 Update for a discussion of *Crawford v Washington*.

## CHAPTER 8

### Scientific Evidence

#### 8.2 Expert Testimony in Sexual Assault Cases

##### A. General Requirements for Admissibility of Expert Testimony

Insert the following text immediately after the January 2004 update to pages 402 and 403:

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, \_\_\_ Mich \_\_\_, \_\_\_ (2004), reiterated the trial court’s gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

“MRE 702 has [] been amended explicitly to incorporate *Daubert*’s\* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court’s fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on ‘novel’<sup>52</sup> science—is reliable.

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<sup>52</sup> See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court’s gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not ‘novel’ has no bearing on whether the court’s gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is ‘novel.’ . . .”

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*Gilbert, supra* at \_\_\_\_.

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). *Gilbert, supra*, at \_\_\_\_.

\**Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993).